INDEX

PAGE

Argument. 1–31

I. The Arguments Advanced by the Respondent Demonstrate Most Clearly Why This Court Should Not Only Hold That the Petitioner Was Deprived of Due Process of Law When the Respondent, Who Was Personally Embroiled in Controversy With Him, and Who Did Not Grant Him a Hearing on the Charges, Proceeded Summarily to Find Him Guilty of Criminal Contempt, But That It Should Also Hold That the Imposition of Summary Punishment for Contempt Itself is Violative of Due Process of Law. 1–19

II. The Respondent Has Advanced No Plausible Arguments to Refute the Petitioner's Contention That He Stood Charged With a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury or His Contention That Criminal Contempt Should Be Considered a Serious Offense Within the Meaning of the Guarantee Regardless of the Penalty Involved. . 19–28

III. In the Case at Bar This Court Should Authoritatively Define the Constitutitonal Requirements Applicable to the Disposition of Criminal Contempt Cases. 28–31

Conclusion. 31

AUTHORITIES CITED

Cases:

	PAGE
Anderson v. Dunn, 19 U. S. (6 Wheat.) 204 (1821)	18
Argersinger v. Hamlin, 407 U. S. 26 (1972)	26
Bloom v. Illinois, 391 U. S. 194 (1968)	10, 15, 19, 25–26, 31
Codispoti v. Pennsylvania, No. 73-5615, this Term	28
Dairy Queen v. Wood, 369 U. S. 469 (1972)	26
In re Dellinger, 461 F. 2d 389 (7th Cir. 1972)	9
District of Columbia v. Clawans, 300 U. S. 617 (1937)	23
District of Columbia v. Colts, 282 U. S. 63 (1930)	23
Duncan v. Louisiana, 391 U. S. 145 (1968)	26
Dyke v. Taylor Implement Manufacturing Co., 391 U. S. 216 (1968)	27
Edmunds v. Chang, 365 F. Supp. 941 (D. Haw. 1973)	23
Frank v. United States, 395 U. S. 147 (1968)	20, 30
Green v. United States, 365 U. S. 301 (1961)	4
Holt v. Virginia, 381 U. S. 131 (1965)	8, 14
Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894)	17
Johnson v. Mississippi, 403 U. S. 212 (1971)	9, 14
Kentucky State Bar Association v. Taylor, Ky., 482 S. W. 2d 574 (1972)	11
In re Little, 404 U. S. 553 (1972)	22, 23
Loving v. Virginia, 388 U. S. 1 (1967)	16
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)	9, 14
Offutt v. United States, 348 U. S. 11 (1954)	9, 11, 14
Sacher v. United States, 343 U. S. 1 (1952)	9, 13–14
Shillitani v. United States, 384 U. S. 364 (1966)	18
Ex parte Terry, 128 U. S. 289 (1888)	3, 9, 11
Tumey v. Ohio, 273 U. S. 510 (1927)	12, 14, 15
Ungar v. Sarafite, 379 U. S. 575 (1964)	7
United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972)	8, 9

Cases: (Cont'd)

PAGE

United States v. Seale, 461 F. 2d 345 (7th Cir. 1972). 11

Ward v. Village of Monroeville, 409 U. S. 57 (1972). 14–15

Weiss v. Burr, 484 F. 2d 973 (9th Cir. 1973)..... 3

Constitutional Provisions, Statutes and Rules:

U.S. Const. Amend. VI.....19–20, 23, 24–25, 26, 30

U.S. Const. Amend. VII..... 26

Kentucky Revised Statutes 436.020.....18, 27

Kentucky Revised Statutes 421.140..... 27

Federal Rule of Criminal Procedure 42(b)..... 28

Kentucky Court of Appeals Rule 3.320..... 24

Other Authorities:

Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing With Trial Disruptions* (1971)..... 3

Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, *Disorder in the Court* (1973).....10–11, 16–17, 17–18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

The Arguments Advanced by the Respondent Demonstrate Most Clearly Why This Court Should Not Only Hold That the Petitioner Was Deprived of Due Process of Law When the Respondent, Who Was Personally Embroiled in Controversy with Him, and Who Did Not Grant Him a Hearing on the Charges, Proceeded Summarily to Find Him Guilty of Criminal Contempt, But That It Should Also Hold That the Imposition of Summary Punishment for Contempt Itself Is Violative of Due Process of Law.

The arguments advanced by the respondent are heavily larded with invective and consist in no small

part of a vicious *ad hominem* attack on the petitioner's character and integrity, as if to somehow say that the petitioner is a "bad man," so that this Court should decide the case in the respondent's favor regardless of the merits of the petitioner's arguments. While there is a natural human tendency to resist this attack and to respond to these arguments in kind, reducing the case to this level would only serve to divert attention from the significant constitutional issues that the petitioner believes are before this Court. To the extent that the respondent tries to meet the issues on the merits, he appears to be arguing as follows. First, there is no right to be heard at all when a trial judge proceeds summarily to punish for contempt, and since the petitioner was given an opportunity to speak on some occasions *after* he was found guilty of contempt, he has no cause to complain. Secondly, since the respondent did not launch an attack on the petitioner from the beginning of the trial, and since he did not castigate him (to use the respondent's own words) in front of the jury while the trial was going on, he was not disqualified from sitting on the contempt charges irrespective of anything else he said or did that would show bias and hostility. Thirdly, the power of a trial judge to summarily convict and punish for contempts purportedly committed in his presence is constitutional because it has long existed, and it is the only way that a trial judge can prevent disruption by lawyers "of the petitioner's ilk." A careful analysis of the arguments advanced by the respondent, it is respectfully submitted, should demonstrate to the Court not only why it is constitutionally necessary to require a full and

fair hearing when a trial judge proceeds summarily to punish for contempt and not only why the respondent could not impartially sit in judgment on the contempt charges he levelled against the petitioner, but also why the Court should at this time declare that the imposition of summary punishment for contempt itself is violative of due process of law.

In support of his argument that there is no right to be heard at all in summary contempt proceedings, the respondent does little more than quote at length from *Ex parte Terry*, 128 U. S. 289 (1888), as if this language somehow answers the arguments that the petitioner has put forth with respect to the right to a modicum of due process before a person can be convicted of a criminal offense. The language in *Terry*, from which the respondent so copiously quotes, "reflects the spirit of an earlier time, when courts were less sensitive to the compelling nature of procedural due process guarantees." *Weiss* v. *Burr*, 484 F. 2d 973, 986, n. 25 (9th Cir. 1973). In this day and age, "such a proceeding has little to commend it, is inconsistent with the basic notions of fairness and is likely to bring disrespect upon the court." Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing with Trial Disruptions*, p. 20 (1971). The petitioner has contended that in light of contemporary standards of due process, a person cannot be sent to prison without being given notice of the charge against him and a meaningful opportunity to be heard in his defense. In this con-

nection, it is also irrelevant that the accuser is at the same time the judge and that he may have witnessed the conduct giving rise to the contempt charge, since if the accused is given a hearing, he may be able to persuade the judge that he perceived the facts inaccurately or that he was mistaken in his view that the conduct in question constituted criminal contempt. See Brief for Petitioner, pp. 36-37. The respondent has been unable to advance an even superficially plausible argument as to why this modicum of due process should be denied to the accused when the trial judge is proceeding summarily.

Nor does the respondent attempt to respond to the petitioner's argument that what due process requires is a *hearing,* in the sense that the trial judge separates the contempt charge from the other matters involved in the trial, states the precise charge and the facts giving rise to that charge, listens objectively and with an open mind to arguments in defense or mitigation and rules on the charge.[1] He merely says that the petitioner "was given a reasonable right to speak *after* he was found to be in contempt." Brief for Respondent, p. 23 (emphasis added).[2] This argument underscores the fact that the petitioner was not given a hearing in

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[1]The respondent also confuses the petitioner's claim of the right to a hearing with the claim of a right of allocution. Strictly speaking, the right of allocution comes into play only at the time of sentencing, see *Green* v. *United States,* 365 U. S. 301, 304 (1961), and if there was any time when the petitioner most clearly was not given a chance to speak, it was when the respondent was publicly castigating him and reeling off sentences aggregating four and one-half years' imprisonment (App. 28-29).

[2]As is clear from the record, the efficacy of this so-called "right to speak" was dubious at best. There were conferences in chambers following the citation on counts 2 through 5. The respondent

(Continued on following page.)

the present case and shows most clearly why such a

(Continued from preceding page.)

totals the number of pages in the transcript that these conferences ran and implies that they were devoted to a discussion of the contempt charges. Brief for Respondent, pp. 24-25. In fact, as a cursory reading of these pages demonstrate, there was only a discussion about the contempt charges following the citation on counts 2 and 3, and the discussion was so intertwined with substantive matters that the petitioner's response to those charges was lost in the shuffle.

In the discussion that followed the citation on count 4 there was no reference at all to the contempt charge. In the discussion that followed the citation on count 5, or more accurately, in the discussion during which the citation on count 5 occurred, the trial judge ordered the petitioner to submit a list of all of his witnesses within five (later changed to ten and then to fifteen) minutes and then told him that he was in contempt "for your actions in the Court just previous to that." When the petitioner asked whether he could respond for the record, the trial judge said that he had ten minutes to submit the witness list and that, "You can speak to the record all you want to sir." See Brief for Petitioner, pp. 43-45. On count 6 the trial judge simply informed the petitioner that he was in contempt, and when the petitioner asked to respond for the record, the trial judge said he could do so at the next recess. However, this opportunity did not occur. As to count 7, the respondent says that the petitioner was given the right to speak for the record, Brief for Respondent, p. 25, but neglects to point out that the trial judge then directed the court reporter not to put the response in the record. The respondent also says that the petitioner did respond to count 8, Brief for Respondent, p. 25. The record, however, shows the following:

> "The Court: The Court finds Mr. Taylor in contempt of court again.
>
> Mr. Taylor: May I speak to the record, Your Honor?
>
> The Court: No sir. What are you going to ask this witness? (App. 113)."

See Brief for Petitioner, pp. 45-46. The respondent also says that, "In his final argument to the jury, he [petitioner] responded (App. 119)." Brief for Respondent, p. 25. In his closing remarks to the jury, the petitioner, as any experienced lawyer would at the end of a hotly-contested case, stated: "I want to try to close. I want to apologize to the Court if I have been intemperate and state to the Court that it would only have been because of the desire to see justice done and the clear conviction and belief that my client is innocent." (App. 119). It is difficult to see how the petitioner's remarks in his closing argument to the jury has anything remotely to do with a response to the contempt charges.

hearing must be constitutionally-required in summary contempt proceedings. What happened here is that the petitioner was found guilty first—the citation and the finding of guilt occurred simultaneously and no charge was specified—and the response, insofar as one was permitted, was strictly for the record. Due process, it is submitted, prohibits the simultaneous citation and finding of guilt and also requires specification of the charge and the opportunity to respond. There must be some occasion when the trial judge listens to argument with an open mind, thinks about what he is doing, and then decides whether the person he has cited was really guilty of criminal contempt. The sequence should be citation for contempt, specification of the charge, opportunity to respond and judgment, rather than as here, the simultaneous citation and finding of guilt. If there is a due process right to a *hearing* in summary contempt proceedings, that right was clearly denied to the petitioner here, and the present case shows beyond a doubt why this modicum of due process must be constitutionally-required.

In arguing that he could impartially sit in judgment on the multiple contempt charges that he levelled against the petitioner, the respondent does not dispute, as he cannot, that he said and did the things attributed to him by the petitioner. He accuses the petitioner of using "unfair and incomplete quotes from the transcript," Brief for Respondent, p. 15, but he does not specify how or why these quotes are "unfair and incomplete," nor does he attempt to "complete" them in

such a way as to show that they do not demonstrate his bias and hostility toward the petitioner. He also argues that the fact that he rescinded the first contempt charge (ignoring the fact that he included it at the end of the trial when sentencing the petitioner to four and one-half years' imprisonment and only subsequently rescinded it in his "corrected judgment") conclusively refutes the charge of bias and hostility *regardless of everything else that occurred subsequently.* Likewise, he says that his admitted "castigation" of the petitioner at the time he imposed sentence is "totally irrelevant to the claim of bias or hostility." Brief for Respondent, p. 17. However, he neglects to explain either why his rescinding the first contempt charge conclusively shows that he was not biased and hostile toward the petitioner or why his "castigation" at the time of sentencing is "totally irrelevant" to the claim. And in an utterly incredible statement, he says in reference to *Ungar* v. *Sarafite,* 379 U. S. 575 (1964), that, "If the words 'you are not only contemptuous but disorderly and insolent' made during the trial by the judge are not sufficient to disqualify, then nothing that Judge Hayes said to Taylor during the trial of this case comes close." Brief for Respondent, p. 17. Some of the more egregious statements made here by the respondent to the petitioner during the course of the trial are set forth in the Brief for Petitioner, pp. 59-62, and they make the statements of the judge in *Ungar* sound like words of praise.

It is not, of course, possible to ignore the respondent's tirade from the bench and his "castigation" of

the petitioner at the time of sentencing. It is also not possible to ignore his *behavior* during and after the trial, such as his requiring the petitioner to produce a list of all his prospective witnesses within fifteen minutes and summarily ruling that a number of them would not be permitted to testify, his invalid order prohibiting the petitioner from the practice of law in "his court," or his refusal to admit the petitioner to bail or to even hold a bail hearing until ordered to do so by the Court of Appeals. It is also not possible to ignore the fact that it was necessary for the petitioner, in order to properly defend the rights of his client, to accuse the respondent of denying his client's right to a public trial,[3] and of acting on the basis of rancor in ruling that race was not an issue in the case, and the fact that the respondent accused the petitioner of inferring that he, the respondent, had "rigged the jury." See *e.g., Holt* v. *Virginia,* 381 U. S. 131 (1965). Nor is it possible to ignore the fact, as the respondent proudly asserts,[4] and as the Court of Appeals found (App. 11), that he had "adopted an adversary picture with respect to the alleged contemnor." *United States* v. *Meyer,* 462 F. 2d 827, 862 (D.C. Cir. 1972). But even if it were possible to ignore all of this, *the statements made by the respondent during the course of*

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[3]That accusation, which included a charge of racial discrimination, was the basis for part of the citation for contempt on count 5. (App. 25).

[4]"Unfortunately for Taylor, when he commenced his collision course aboard the vessel Disruption, he failed to observe Judge Hayes at the helm of the Leviathan. Taylor is the deliberate begetter of his own predicament." Brief for Respondent, p. 48.

the trial alone demonstrate his hostility and bias toward the petitioner beyond peradventure.

Finally, the respondent quotes at length from *Sacher* v. *United States,* 343 U. S. 1 (1952), and argues that, "Comparing the record here with the record in *Sacher* is like comparing Heaven and Hell." Brief for Respondent, p. 21. Apparently he is trying to argue that if the trial judge in *Sacher* was not disqualified from sitting in judgment on the contempt charges, then he should not be found to have been disqualified here either. Reliance on *Sacher* to support a claim of judicial impartiality has about the same efficacy today as relying on *Ex parte Terry, supra,* to define contemporary standards of due process of law. The disqualification aspect of *Sacher* (which involved only the question of disqualification in the face of a personal attack by the alleged contemnor on the judge) has been completely eroded away by numerous subsequent decisions of this Court. See the discussions in *United States* v. *Meyer, supra,* at pp. 831-845, and *In re Dellinger,* 461 F. 2d 389, 392-395 (7th Cir. 1972). In effect, by relying on *Sacher,* the respondent is asking this Court to overrule *Offutt* v. *United States,* 348 U. S. 11 (1954); *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971); *Johnson* v. *Mississippi,* 403 U. S. 212 (1971), and cases of similar import or to limit them to their precise facts. What this Court did in these cases, however, was not merely to rule on a challenge to a judge's lack of impartiality in a particular case, but to establish the principle that as a matter of due process a judge cannot sit in judgment on contempt

charges in any case where for any reason he has become "personally embroiled in controversy" with the alleged contemnor. If, on the facts of this case, it can be said that the respondent was not "personally embroiled in controversy" with the petitioner, the concept of "personally embroiled in controversy" will have no meaning whatsoever. By no stretch of the imagination did the petitioner have that trial before an unbiased judge, which is essential to due process of law. *Bloom* v. *Illinois*, 391 U. S. 194, 205 (1968).

The petitioner has further argued that this Court should now consider whether the exercise of the summary contempt power itself is violative of due process of law. If it is recognized that due process requires that the accused be given a hearing notwithstanding that the alleged contempts were committed in the presence of the trial judge, it is but a short step to holding that there can be no justification at all for a judge proceeding summarily to convict and punish a person for criminal contempt. If this Court were to so hold, it would no longer be necessary to determine in every case whether the particular judge was "personally embroiled in controversy" with the accused. More importantly such a holding would abolish this "anomaly in the law" once and for all and would end the only situation in which the otherwise inconsistent functions of prosecutor, judge and jury are combined in a single individual who is necessarily involved in the events leading up to the charge. In the process the pattern of appellate reversals of summary contempt convictions, see *Disorder in the Court* 233-234 (1973), would

also come to an end. And most importantly, in this area of the law, justice would now "satisfy the appearance of justice." *Offutt* v. *United States, supra,* at p. 14.

In arguing for the retention of the summary contempt power, the respondent does little more than say that the exercise of this power must be constitutional because it has existed for so long and continue the *ad hominem* attack against the petitioner that has permeated his entire brief, saying that, "The power of summary contempt must exist because of the petitioner and those like him." Brief for Respondent, p. 33.[5] It is tempting to reply that, "The summary contempt power cannot exist because of the respondent and those judges like him," but such an argument would fall wide of the mark. Although the facts present here do demonstrate most cogently, as this Court has long-recognized, that the exercise of the summary contempt power is "arbitrary in its nature and liable to abuse," *Ex parte Terry, supra,* at p. 313, the ques-

[5]The respondent also refers to the fact that the petitioner received a six month suspension for overstepping the bounds of permissible advocacy in another hotly-contested murder case where again, as the Court of Appeals recognized, the petitioner was confronted with an intemperate and hostile judge. *Kentucky State Bar Association* v. *Taylor,* Ky., 482 S. W. 2d 574 (1972). In that case the Court observed: "Whatever may be the judge's conduct, the remedy lies somewhere else, and if both court and counsel misbehave the damage to the profession and to the image of justice in the public eye is doubled." 482 S. W. 2d at 574. Improper conduct by the trial judge likewise is said not to be a substantive defense to a charge of criminal contempt. See *e. g., United States* v. *Seale,* 461 F. 2d 345, 362-363 (7th Cir. 1972). There is something fundamentally unfair in subjecting the lawyer to disciplinary action and punishment for contempt as a result of his improper conduct while the trial judge can do as he wishes with impunity.

tion of the constitutionality of the summary contempt power obviously involves considerations going far beyond the facts of this case and the participants involved.

In this connection the petitioner would submit that the facts of this case—egregious as they may be—should be disregarded and that the qutstion of the constitutionality of the summary contempt power itself should be approached on the assumption that it will be exercised by an able and fair-minded judge who has not become "personally embroiled in controversy" with the alleged contemnor. It is the petitioner's contention that no matter how able and fair-minded a particular judge may be, the exercise of the summary contempt power by *any* judge is violative of due process of law. This is so for two fundamental—and incontrovertible—reasons. In the first place, in exercising the summary contempt power, the judge necessarily performs the inconsistent functions of prosecutor, judge and jury, and this is most clearly the situation "in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927). At the same time as he is making a "decision to prosecute," the judge is acting as a jury in finding the facts and acting as a judge in determining whether those facts constitute criminal contempt. It is obviously impossible for a single individual to compartmentalize his

mind in this manner, and the judge cannot stop "thinking like a prosecutor" at the same time as he is performing the functions of judge and jury as well. In this country, a criminal proceeding is prosecutory and adversary, and the prosecutor, the judge and the jury, along with defense counsel, have distinct functions to play, all of which relate to protecting the accused's right to a fair trial. The inconsistent combination of these functions in a single person, therefore, is inherently a denial of due process of law.

Secondly, the trial judge is necessarily involved in the events leading up to the contempt charge and no matter how hard he may try, he cannot divorce his position as "the Court" against whom the purported contempt was committed from his position as the trier and the judge of the contempt charge. This point was recognized by Justice Jackson in *Sacher* v. *United States, supra,* when he wrote for the majority:

> "It is almost inevitable that any contempt of court committed in the presence of the judge during the trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other." 343 U. S. at 12.

The approach of the Court in *Sacher,* however, was to reject disqualification of the judge as a defense to summary contempt proceedings, at least where the basis

of the disqualification was a personal attack on the judge by the accused. To this extent the approach in *Sacher*, is, of course, effectively overruled by *Mayberry* v. *Pennsylvania, supra*, and the *Sacher* approach never had been followed where the judge was an "activist seeking combat," *Offutt* v. *United States, supra*, or had been charged with improper conduct by the alleged contemnor. *Holt* v. *Virginia, supra; Johnson* v. *Mississippi, supra.*

While this Court has now recognized that there can be judicial disqualification in particular cases, it has never considered whether the rationale of *Sacher*—that any contempt of court committed in the presence of the judge will be treated as an offense against him personally—is still valid. It is respectfully submitted, for the reasons previously stated, that the rationale of *Sacher* is indeed valid, and thus that the exercise of the summary contempt power itself is violative of due process of law.

In this regard it may be fruitful to compare this Court's decision in *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), with its decision in *Tumey* v. *Ohio*, 273 U. S. 510 (1927). In *Tumey* the Court found trial before the mayor violative of due process of law because he personally received income from the fees and costs levied by him against alleged violators. The mayor in *Tumey* may be likened to the judge "personally embroiled in controversy" with the alleged contemnor, since he has a personal stake in finding the accused guilty of contempt. In *Ward* the mayor did

not share in the fees and costs. This Court found the lack of personal interest irrelevant insofar as the denial of due process was concerned, stating:

> "The fact that the mayor there [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle . . . [t]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused'. . . . Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contributions from the mayor's court." 409 U. S. at 60.

By the same token the fact that the judge is charged with maintaining order in the court over which he presides offers a "possible temptation not to hold the balance, nice, clear and true between the [court] and the accused," *particularly when he is also acting simultaneously as prosecutor, jury, and judge.* If it was a denial of due process for the mayor to adjudicate the guilt of traffic offenders in *Ward,* it is clearly a denial of due process for a judge before whom an alleged contempt has been committed to adjudicate the guilt of the accused in a summary proceeding. In short, trial by the judge before whom an alleged contempt has been committed is inherently a denial of the right to trial before an unbiased judge, *Bloom* v. *Illinois, supra,* and thus violative of due process of law.

Insofar as the respondent attempts to proffer any justification for the exercise of the summary contempt power—other than its durability—it is the familiar shibboleth of "preserving order." In this vein the respondent argues that, "If the present rules of summary contempt are destroyed, it will subject a trial judge to 'open season' by those who claim they have regard for the rights of others but in truth have no feeling for anyone's rights except their own." Brief for Respondent, p. 47. The question is thus squarely presented: should this Court sanction the continuation of what would otherwise be considered an inherent denial of due process of law on the ground that it is necessary to "preserve order?" To answer that question, the petitioner would propose drawing an analogy to the compelling state interest test that this Court has employed in other areas, see *e.g., Loving* v. *Virginia*, 388 U. S. 1 (1967), and would posit the issue as follows: is there a compelling state interest in "preserving order in the courtroom" that cannot be achieved by means other than the exercise of the summary contempt power, so that the exercise of the summary contempt power is constitutional despite the inherent unfairness to the accused that results?

In the first place, it is submitted that there would be a compelling state interest in "preserving order in the courtroom" only if it were demonstrated that American society is faced with a serious problem of disruption in judicial proceedings. All the empirical evidence is to the contrary. See *Disorder in the Court*,

pp. 6-9.[6] More importantly perhaps, to the extent that any problem of disruption does exist and to the extent that it is necessary to "preserve order" in the courtroom, this objective can be accomplished by "less drastic means" than the exercise of the summary contempt power with all of its inherent unfairness. Any need to "preserve order" can be accomplished by the trial judge's *citing* the offending lawyer or party for contempt, and the deterrent effect of a conviction for criminal contempt will be no less because the determination of guilt and punishment will occur in another proceeding and in accordance with the requirements of due process of law.[7] See the discussion in *Disorder in the*

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[6]That the absence of disruption is not due to the fact that judges now possess the summary contempt power is demonstrated by the fact that there is no discernible problem of disruption in administrative proceedings, even though administrative agencies have long been denied the summary contempt power. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894). Disruption is not a serious problem because lawyers and litigants recognize that it is in their best interests that proceedings be orderly. Even the respondent admits that disruption is not a serious problem and that the absence of disruption is not due to the existence of the summary contempt power. As the respondent states: "With the exception of a minute number of those licensed to practice law, no deterrent is necessary. All but a very few, we are proud to say, do everything possible to maintain the high standards of the profession. It is not fear of punishment or sanction that prevents the average lawyer from becoming obstreperous and contemptuous but it is an affirmative regard for the rights of others and the high privileges lawyers have." Brief for Respondent, p. 32.

[7]It is interesting to note that in the case at bar any supposed deterrent effect that could have resulted from the respondent's proceeding summarily to simultaneously cite the petitioner for contempt and find him guilty of the charge was minimized because the respondent did not impose sentence at the time he acted. Although the petitioner stood convicted of eight contempts, he had no idea that he would receive a sentence of four and one-half years' imprisonment. So far as he knew, the sentence would have had to

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Court, 131-132. This Court has clearly recognized the applicability of the "less drastic means" test to the exercise of any form of judicial power—it is a long established principle that a court must exercise "the least possible power adequate to the end proposed," *Anderson* v. *Dunn,* 19 U. S. (6 Wheat.) 204, 231 (1821)—and in particular to the exercise of the contempt power. See *Shillitani* v. *United States,* 384 U. S. 364 (1966). Since courtroom disorder can adequately be prevented by the "less drastic means" of citing the alleged offender for criminal contempt, there is no compelling necessity to permit trial judges to exercise the

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have been limited to a maximum of 30 hours in jail and $30 on each of the counts, since at that time Ky. Rev. Stat. 436.020, limiting the power of the judge to impose greater sentences without the intervention of a jury, had not yet been declared invalid by the Court of Appeals. Instead the respondent, without giving the petitioner a chance to speak a word in defense or mitigation, and denying him the right of allocution at the one time in the case that the right of allocution as such was proper, reeled off sentences aggregating four and one-half years' imprisonment. Even if the statute was not in effect, the petitioner had no way of knowing what the sentence would be and could have been no more "deterred" than he would have been if he had merely been cited for contempt.

In the exceedingly rare case where a lawyer will have embarked on a course of persistent obstruction—which the petitioner earnestly contends, and as the record shows, did not happen here—it is doubtful if punishment for contempt, whether imposed on the spot or threatened subsequently, will make any difference. Moreover, the conduct of the lawyer will have invariably prejudiced his client in the eyes of the jury, thereby necessitating that the court declare a mistrial. See Brief of the Louisville Bar Association as Amicus Curiae, pp. 32-33. It is also interesting to note that the respondent states, "Antics such as Taylor performed here must have prejudiced his client." Brief for Respondent, p. 31. If this is so, why, may it be asked, *did the respondent not declare a mistrial?* The conclusion is inescapable that the petitioner's so-called "antics"—which the petitioner insists the respondent has confused with vigorous and innovative advocacy—did not prejudice his client in any way, else the respondent would have declared a mistrial.

summary contempt power and to sanction the inherent denial of due process that results from that exercise.

It must be emphasized that no challenge is made to the constitutionality of the substantive offense of criminal contempt. The challenge is only to the summary conviction and punishment for the offense by the judge who is necessarily involved in the events leading up to the contempt charge and who in proceeding summarily is performing the inconsistent functions of prosecutor, jury and judge. All that the petitioner asks is that a person charged with criminal contempt, "a crime in the ordinary sense, *Bloom* v. *Illinois, supra,* at p. 201, be given those same "institutionalized procedures which have been worked out over the centuries," *Id.* at 208, that are given to every other criminal defendant no matter how serious or how petty his crime. This Court should now so hold.

II.

The Respondent Has Advanced No Plausible Arguments to Refute the Petitioner's Contention That He Stood Charged With a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury or His Contention That Criminal Contempt Should Be Considered a Serious Offense Within the Meaning of the Guarantee Regardless of the Penalty Involved.

The petitioner has argued that even though the actual sentence imposed for criminal contempt, including by retroactive amendment if necessary, does not exceed six months, there is still the right to a trial by jury if other objective criteria show that he was charged

with a serious offense within the meaning of the Sixth Amendment's guarantee. He has also argued that this Court should now consider whether criminal contempt must be treated as a serious offense within the meaning of the trial by jury guarantee because of the nature of the offense itself without regard to the penalty involved. With respect to the petitioner's first argument the respondent merely replies that this Court has imposed a "six month rule" in all cases of criminal contempt and that since appellate courts have the power to modify sentences, it does not matter if the petitioner's sentence was modified retroactively to bring it within a purported "six month rule." The petitioner has demonstrated at length that this Court has not imposed a "six month rule," Brief for Petitioner, pp. 19-23, and the respondent has made no effort to respond to this argument. It must be emphasized that while this Court *said* in *Frank* v. *United States,* 395 U. S. 147, 149 (1968), that where no maximum punishment for criminal contempt is authorized, "The severity of the penalty actually imposed is the best indication of the seriousness of the particular offense," it has not held that the severity of the penalty actually imposed is the only indication of seriousness, and it emphasized in *Frank* that it was looking for "objective indications of the seriousness with which society regards an offense." 395 U. S. at 148. It definitely has not held that so long as the penalty actually imposed, including by retroactive amendment if necessary, does not exceed six months, there is no right to a jury trial regardless of other objective indications showing that *par-*

ticular charges of criminal contempt in particular circumstances involved a "serious offense" within the meaning of the trial by jury guarantee.

In the case at bar these "other objective indications" were clearly present. See Brief for Petitioner, pp. 24-26. The respondent does not deal with these arguments except to say that the seriousness with which he viewed the offense is irrelevant so long as the sentence actually imposed does not exceed six months. Brief for Respondent, pp. 43-44. In addition, the respondent makes much of the fact that an appellate court has the power to modify sentences. This the petitioner does not dispute. What the petitioner contends in this respect is simply that if the sentence actually imposed is indeed "the best indication of the seriousness of the particular offense," the modification of the sentence by the appellate court to bring it within a purported "six month rule," does not convert what would be an otherwise serious offense under this standard to a "petty offense" so as to deprive the accused of his right to trial by jury. At least this should be so, where as here, the sentence is *not* reduced on the ground that the accused was not guilty of "serious" conduct.

What stands out most clearly from the appellate court's modification of the sentence and its order that the sentences on the separate counts must run concurrently is that at the same time as it was holding that the petitioner had only been convicted of a "petty" offense within the meaning of the trial by jury guarantee, it attacked the petitioner's character and conduct in the most opprobrious terms and accused him

of the most serious conduct of which a lawyer can be accused—embarking on a deliberate plan to disrupt the trial and thwart the administration of justice. This characterization is revelant, of course, only to show the serious nature of the charge against the petitioner. If it were proper to do so in the context of this case, petitioner would most vigorously dispute this characterization of his character and conduct, demonstrate that it is totally unsupported by the record and show that what he was doing was to zealously defendant to the best of his ability his client charged with a capital offense. He would also strenuously contend that none of the charges for which he was convicted could constitutionally support a conviction for criminal contempt. *In re Little,* 404 U. S. 553 (1972). But as the respondent seemingly fails to realize, the substantive guilt or innocence of the petitioner is not in issue before this Court. It is precisely because the conduct of the petitioner was characterized in this way by the respondent and by the Court of Appeals—regardless of whether the characterization is remotely supported by the record—that the petitioner stood *charged* with a serious offense within the meaning of the trial by jury guarantee. Unless this Court is prepared to hold that there can *never* be a right to trial by jury in cases of criminal contempt where the penalty actually imposed, including by retroactive amendment if necessary, does not exceed six months, there can be no doubt that in the circumstances of this case, the petitioner was charged with a serious offense and was entitled to have his guilt or innocence determined by a jury.

The petitioner has further contended that this Court should now hold that criminal contempt is a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee because the nature of the offense—which requires a material obstruction to the administration of justice, *In re Little, supra,*—is likely to be regarded as contrary to the "social and ethical judgments of the community," *District of Columbia* v. *Clawans,* 300 U. S. 617, 628 (1937), in a society in which the fair and orderly administration of justice is held in high regard. This being so, it is the nature of the offense rather than the penalty authorized or imposed that should be determinative of the right to a jury trial. *District of Columbia* v. *Colts,* 282 U. S. 63 (1930).

In this connection the petitioner has noted that the seriousness of a charge of criminal contempt against an attorney is magnified because of the collateral consequences, such as disciplinary action or injury to a lawyer's professional reputation and his "balance of harmony with the courts" that may result from a contempt conviction. See the discussion in *Edmunds* v. *Chang,* 365 F. Supp. 941, 944 (D. Haw. 1973). He has not suggested, however, that there should be a different rule for attorneys and non-attorneys with respect to entitlement to a jury trial for contempt, only that because so many contempt cases do involve attorneys, the collateral consequences to an attorney arising from a contempt conviction should be taken into account in determining whether criminal contempt is by its very nature a serious offense within the meaning of the trial by jury guarantee.

The respondent's reply to this argument focuses entirely on the collateral consequences to an attorney, and what the respondent appears to be arguing is that criminal contempt is not a serious offense within the meaning of the trial by jury guarantee, because in Kentucky an attorney is not *automatically disbarred* upon conviction for criminal contempt. It is difficult to see how the fact that criminal contempt is not a "serious misdemeanor involving dishonesty or stealing" within the meaning of Kentucky Court of Appeals Rule 3.320 has anything remotely to do with the question of whether it is a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee. While a conviction for criminal contempt does not automatically result in disbarment, in Kentucky and elsewhere, an attorney convicted of criminal contempt may well face some degree of professional discipline, and more importantly perhaps, his reputation and ability to function as a lawyer may be adversely affected by the conviction.[8] Apart from his clearly misplaced

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[8]The respondent concludes his Brief by emphasizing the importance of the trial by jury guarantee, stating:

> "The jury system for determining the truth of a controverted fact may not be perfect, but with all the procedural safeguards relative to evidence and trial practice, it has proved to be the most workable and enduring under our system of Anglo-American jurisprudence. There are those who would destroy it, but oddly enough, they have failed to advance a better system." Brief for Respondent, p. 49.

The petitioner would endorse these sentiments fully, and would contend that for precisely these reasons the right to trial by jury should extend to all cases of criminal contempt. It is rather incongruous, however, for the respondent to praise the jury system so highly, while at the same time argue that the jury system is not the proper vehicle for determining guilt or innocence in the case of criminal contempt.

argument as to the significance of the collateral consequences that may result to an attorney from his conviction for criminal contempt, the respondent makes no real effort to reply to the argument that criminal contempt, because of the nature of the offense itself, is a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee.

The question of the right to trial by jury in cases of criminal contempt cannot be fully divorced from the question of the "institutional bias" that necessarily exists when a *judge* is called upon to determine whether an accused is guilty of contempt of *court*. Even though the judge is not the one before whom the alleged contempt was committed, the nature of the offense necessarily involves a confrontation between the accused and the court, and the "institutional bias" in favor of the brother judge and against the accused can never be absent. Stated simply, a *court*, through the person of a *judge*, should not sit in judgment on contempts of court, and the inherent "institutional bias" that exists in such a situation can be obviated by holding that the right to trial by jury extends to all cases of criminal contempt. This principle was seemingly recognized in *Bloom* v. *Illinois*, 391 U. S. 194, 202 (1968), where this Court observed:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's

> temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

If the Sixth Amendment's guarantee of trial by jury truly does reflect a "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968), there is no case more appropriate for the invocation of that guarantee than a prosecution for criminal contempt. This Court should now so hold.

The petitioner has further argued that this Court should now also consider whether there is the right to trial by jury any time an accused faces the possibility of a period of imprisonment as punishment for a crime, as it has held with respect to the right to the assistance of counsel. *Argersinger* v. *Hamlin*, 407 U. S. 26 (1972).[9] See Brief for Petitioner, pp. 33-34. Even if the Court is not willing to go this far, it should hold that any time the accused faces the possibility of "substantial imprisonment," *i.e.*, imprisonment beyond a

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[9]In *Argersinger* the Court distinguished the right to trial by jury from the right to the assistance of counsel only on the ground that there was "historical support" for limiting the right to trial by jury to "serious cases." 407 U. S. at 30. But just as this Court has disregarded the historical practice in determining the applicability of the Seventh Amendment's right to trial by jury guarantee in civil cases where damages are sought, *Dairy Queen* v. *Wood*, 369 U. S. 469 (1962), it should not allow the historical practice to determine the applicability of the Sixth Amendment's right to trial by jury guarantee in criminal cases where the accused faces a possible loss of his liberty through imprisonment.

brief period of time, the right to trial by jury should attach.[10]

However, the petitioner fully recognizes that since this case involves the question of the right to trial by jury in cases of criminal contempt, the Court may not wish to formulate a rule governing the right to trial by jury in other cases. The petitioner has argued that criminal contempt is because of the nature of the offense itself a serious offense within the meaning of the trial by jury guarantee. If the Court is not willing to accept this contention fully, it should at least recognize that criminal contempt is a serious offense in many situations, and should hold that the right to trial by jury attaches in criminal contempt cases whenever the accused faces the possibility of "substantial imprisonment." Under such an approach the contours of "substantial imprisonment" may be defined by this Court's decision in *Dyke* v. *Taylor Implement Manufacturing Co.*, 391 U. S. 216 (1968), where it held that a sentence of ten days' imprisonment was not "substantial" so as to bring into play the accused's right to trial by jury.

If the Court adopts this approach to the right to trial by jury guarantee in criminal contempt cases and if it also holds that criminal contempt may not be proceeded against summarily, the process of adjudication of criminal contempt would operate as follows. When the alleged contempt was committed in the presence of the trial judge, he would cite the party for

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[10]This was the approach in Kentucky to imprisonment for criminal contempt under Ky. Rev. Stat. 421.140 and 436.020 until these statutes were invalidated by the Court of Appeals. In non-contempt cases the right to trial by jury exists without regard to any possible punishment. See Brief for Petitioner, pp. 26-28.

criminal contempt. The case would subsequently be tried before another judge presumably under a procedure similar to that set forth in Federal Rule of Criminal Procedure 42(b). If the trial judge believed that the alleged contempt was of a sufficiently serious nature to merit punishment upon conviction of "substantial imprisonment" (let us assume for these purposes that "substantial imprisonment" means imprisonment in excess of ten days), he would so certify, and the case would be tried before a jury. If he did not so certify, it would be tried to the Court.[11]

The petitioner asks this Court to hold that the right to trial by jury is required in all cases of criminal contempt, but if it is not willing to go this far, it should at least hold that the right to trial by jury is required when the accused faces the possibility of "substantial imprisonment."

III.

In the Case at Bar This Court Should Authoritatively Define the Constitutional Requirements Applicable to the Disposition of Criminal Contempt Cases.

The nature of the grant of certiorari in the case at bar, coupled with the grant of certiorari in *Codispoti* v. *Pennsylvania*, No. 73-5615, this Term, indicates that this Court is now giving plenary consideration to the constitutional requirements applicable to the disposition of criminal contempt cases. The respondent dis-

[11] If multiple contempts were involved, the question of whether the proposed sentences had to be aggregated for jury trial purposes would be determined by this Court's decision in *Codispoti* v. *Pennsylvania*, No. 73-5615, this Term.

agrees that this is a case of "great constitutional dimension and import," and argues that the present rules of summary contempt (as he perceives them) should be "immutable." He asks this Court to decide the case only with reference to the "outrageous facts that are present here." Brief for Respondent, p. 47. The petitioner agrees that the facts are indeed "outrageous," but for totally different reasons than those perceived by the respondent. On the facts of this case, petitioner contends that he was clearly denied the right to trial before an unbiased judge, that he was not given a hearing satisfying the minimal requirements of due process of law, and that he stood charged with a serious contempt entitling him to the right to trial by jury instead of trial before his accuser.

The petitioner does not believe, however, that this Court has granted certiorari in this case to decide whether the petitioner or the respondent was "in the right." The issues presented here have great significance for lawyers and judges everywhere and for the administration of justice itself. The need for this Court to authoritatively define the constitutional requirements applicable to the disposition of criminal contempt cases stems from the fact that this is the only area of the criminal law where punishment can be imposed summarily and where the inconsistent functions of prosecutor, jury and judge are combined in the same individual who is necessarily involved in the events leading up to the charge. Moreover, the matter of entitlement to a jury trial in this area is extremely uncertain because in determining the question, this

Court has given great weight to the sentence actually imposed while at the same time looking for "objective indications of the seriousness with which society regards an offense." See *Frank* v. *United States, supra.* The necessity for this Court to set forth the constitutionally-permissible procedures to be followed in criminal contempt cases is abundantly clear.

The petitioner asks this Court to hold first that the exercise of the summary contempt power is itself violative of due process of law and secondly that criminal contempt is a serious offense within the meaning of the Sixth Amendment's guarantee of trial by jury irrespective of the penalty that is authorized or imposed. If the Court were to so hold, the result would be that all criminal contempt proceedings would be presided over by a judge other than the one before whom the purported contempt was committed, and there would be the right to trial by jury in all criminal contempt cases. If, however, the Court is unwilling to give the summary contempt power a long-deserved burial, it should at least hold that an accused contemnor is entitled as a matter of due process to a full and fair hearing on the charge before he is found guilty and sentence is imposed, and should set clear standards relating to disqualification of the trial judge so that no appellate court could hold, as the Kentucky Court of Appeals did here, that a trial judge so "personally embroiled in controversy" as was the present respondent could sit in judgment on the charge. So too, if it is unwilling to hold that the right to trial by jury applies to all cases of criminal contempt or to all

cases where the possibility of any imprisonment is involved, it should at least hold that the right to trial by jury extends to any case of criminal contempt where the accused faces the possibility of "substantial imprisonment."

In the final analysis, it is respectfully submitted that the position for which the petitioner is contending in this case is the position most in accord with "those institutionalized procedures which have been worked out over the centuries," *Bloom* v. *Illinois,* 391 U. S. 194, 208 (1968), and should commend itself to this Court.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the judgment of the Court of Appeals of Kentucky should be reversed and the conviction of the petitioner for criminal contempt should be set aside.

Respectfully submitted,

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